

No. 14,982

United States Court of Appeals
For the Ninth Circuit

R. P. HILL and MARY HILL,
Appellants,

vs.

A. E. WAXBERG, doing business as Wax-
berg Construction Company,
Appellee.

Appeal from the District Court for the
District of Alaska, Fourth Division.

BRIEF OF APPELLEE.

R. J. McNEALY,
207 Nerland Building, Fairbanks, Alaska,
EVERETT W. HEPP,
510 Second Avenue, Fairbanks, Alaska,
Attorneys for Appellee.

FILED

JUL 25 1956

PAUL P. O'BRIEN, CLERK

Subject Index

| | Page |
|---|------|
| Jurisdiction | 1 |
| Statement of Case | 1 |
| Answer to appellants' specification of errors | 6 |
| Law and argument | 8 |
| I. Evidence was sufficient to establish a case for the jury | 8 |
| II. Defendants' requested instructions | 18 |
| III. Court's instructions | 18 |
| IV. Excessive verdict | 21 |
| Conclusion | 21 |

Table of Authorities Cited

| Cases | Page |
|--|-------------|
| Baker & Company v. Ballantine & Sons, 20 Atl. 2d 82..... | 17 |
| Boardman v. Ward, 42 N.W. 202, 12 Am. St. Rep. 749 | 16 |
| Brown v. Crown Gold Milling Co., 89 Pac. 86 | 12 |
| City Ice & Fuel Co. v. Bright, 73 F. (2d) 461 | 17 |
| Estate of Walton, 238 N.W. 577 | 13 |
| Martin v. Wright's Adm'rs, 28 Am. Dec. 468 | 16 |
| Pierson v. Pierson, 115 P. 2d 742 | 16 |
| Thurston v. Nutter, 47 A.L.R. 1156 (134 Atl. 506) | 10 |
| Troyer v. Fox, 298 Pac. 733 | 9 |
| United States Potash Co. v. McNutt, 70 F. (2d) 126 | 21 |

Statutes

| | |
|--|---|
| 28 U.S.C.A., Section 1291 | 1 |
| 28 U.S.C.A., Section 1294, para. 2 | 1 |
| Federal Housing Authority, Section 608 | 2 |

Rules

| | |
|--|---|
| Federal Rules of Civil Procedure, Rule 15(b) | 6 |
|--|---|

Texts

| | |
|--|----|
| 46 American Jurisprudence, page 99 | 13 |
|--|----|

No. 14,982

United States Court of Appeals For the Ninth Circuit

| | |
|---|--------------------|
| R. P. HILL and MARY HILL, | } |
| vs. | |
| A. E. WAXBERG, doing business as Wax- berg Construction Company, | |
| | <i>Appellants,</i> |
| | <i>Appellee.</i> |

Appeal from the District Court for the
District of Alaska, Fourth Division.

BRIEF OF APPELLEE.

JURISDICTION.

The jurisdiction of this Court is invoked by the provisions of Title 28 U.S.C.A. Section 1291 and Section 1294, paragraph 2.

STATEMENT OF CASE.

Appellee was a contractor, at all times mentioned herein, in Fairbanks, Alaska. His testimony was that he first entered negotiations to build a building for Appellant in December, 1949. (TR 43) under a verbal

agreement "that it more or less grewed as we progressed" (TR 45).

An outgrowth of this meeting was that Appellee became a co-sponsor with Appellants to construct a building under Section 608 of the Federal Housing Authority. It is not too early to state that while the actual building discussed and planned was not built, a building was later constructed by Appellants in which was incorporated much of Appellee's efforts, including the FHA Commitment, revised.

Invitations to bid on the construction were never given by Appellants as is usual where the contractor must supply cost figures at his own expense (TR 45-46).

In connection with the building and securing an FHA Commitment therefor, Mr. Waxberg testified that Mr. Hill asked him to come to Seattle to confer with architects Chiarelli and Kirk (TR 46) and that he did so (TR 47); that at the request of Mr. Hill, respondent hired William Equipment Company to secure a drill log (TR 47) and that he, Waxberg, paid for the same (TR 48); that he caused a survey to be made at request of Appellants (TR 48); that Appellee made "three or four" trips to Seattle on the project and that an FHA Commitment was issued (TR 49).

Mr. Waxberg further testified that after the FHA Commitment was secured, both he and the architects were "kicked out" (TR 51). He went on to testify that in May, 1950, Mr. Hill proposed that Waxberg

pay to Hill the sum of fifty thousand dollars of the builder's expected profit and when he refused, Mr. Hill dismissed him and ended all relationships (TR 52-54).

After Plaintiff below rested his case, a motion was made for a directed verdict by Defendants' attorney (TR 167). Later, Appellee elected to stand on his third cause of action (TR 182) and (TR 203) with leave of the Court, Plaintiff below filed his third amended complaint to conform to the testimony of Waxberg which went into the record without objection.

Glenn Roy Sumter, President of Washington Mortgage Company, was the first witness for Defendant below who testified as to meeting Mr. Waxberg and traveling in company with him to Juneau in connection with the subject matter of this case (TR 225-226).

That he, Sumter, prepared the application for the FHA mortgage for the building involved in this action on which Waxberg was a co-sponsor. Mr. Sumter further testified (TR 220-221) as follows:

“Q. Now, let me ask you, do you know why Mr. Waxberg is shown as participating to the extent of forty-five thousand dollars here in the application?

A. Yes. As I previously stated at that time Mr. Hill did not have the resources to, other than land, to construct it, or finance the equity requirements and forty-five thousand of the contractor's allowable fee was to be used as equity capital.

Q. And do you know why Mr. Waxberg's name was placed on the application?

A. As I recall at that time he was interested in building the proposed building for them."

and at TR 266-268 on re-cross as to the value of the FHA Commitment which Mr. Waxberg co-sponsored, we find:

"Q. Now you say there is another section under which this building could have been built; why didn't you use that instead of revising this original commitment?

* * * * *

A. The matter of fees. He paid three and one-half per thousand for the processing of this application. In order to switch to a Section 207 he would lose his entire fee. Also the charter under which the 608's were controlled by the Federal Housing Administration were far more lenient than the charter under Section 207.

* * * * *

Q. How much would that amount to?

A. Around forty-eight hundred dollars.

* * * * *

A. Yes, it was worth forty-eight hundred dollars.

Q. In terms of cash, and in terms of leniency and operation it could be an unmeasurable value but nevertheless in terms of dollars and cents of considerable value to an owner, is that right?

A. Yes.

* * * * *

Q. Up to this point then at least there have been benefits gained under the commitment which Mr. Waxberg co-sponsored?

A. I think forty-eight hundred dollars or thereabouts is."

At TR 271 Mr. Waxberg was called to testify for the defendants below. Counsel for Mr. Hill examined at length as to how Waxberg arrived at a figure of forty-three days time spent on the project commencing on TR 276-278.

Rudell P. Hill, the Appellant was the next witness and first testified that Waxberg was a co-sponsor for the FHA Commitment and had agreed to leave forty-five thousand dollars of the builder's profit in the building and at (TR 298) :

“Q. Was the, was a commitment issued on the basis of this application?

A. It was.”

Mr. Hill at TR 303-304 testified that it was Waxberg who breached their agreement and his testimony was generally conflicting as to material points with that of Waxberg, concerning who was at fault.

It appears from the general testimony of both contestants that there was some sort of agreement between them. Both parties agreed that a commitment for FHA approval was applied for by them; that if a commitment was not granted the Appellee Waxberg was to forget his loss, but if a commitment was issued Waxberg was to build the structure.

Mr. Hill testified he wanted Waxberg to build the building, it was agreed the commitment was issued and thereafter the parties fell into dispute, each claiming the other at fault.

The Court left the matter to the jury and they returned a verdict for \$11,067.46 for the Appellee.

ANSWER TO APPELLANTS' SPECIFICATION OF ERRORS.

Answer to errors specified are numbered to correspond with Appellants' brief as follows:

1. Reading of the transcript discloses sufficient facts to submit the case to jury.

2. Rule 15(b) Federal Rules of Civil Procedure provides for amendment of pleadings to conform to the evidence "upon motion of any party at any time, even after judgment" and we believe the Court properly allowed the filing of the third amended complaint to conform to the evidence and testimony that went in without objection of Defendant below.

3. Again we believe the transcript discloses facts worthy of consideration by the jury and that a directed verdict would have been error.

4. Counsel believes that Defendants' Requested Instructions No. 1, 2, 4 and 5, were improper; that the Court acted properly in excluding them; and that if the same had been given they would have, in effect, been a directed verdict for Appellants in the Court below which was not warranted under the fact situation.

5. The jury heard the facts and it must be assumed the evidence was sufficient to convince them as to their verdict.

6. As to the verdict being excessive we believe the amount was justified by uncontradicted testimony of the respondent and of Exhibits admitted to evidence without objection together with testimony of Appellants' witnesses, as follows:

| | |
|---|-------------|
| (TR 58) A. E. Waxberg testified he furnished service for forty-three (43) days at a reasonable value of one hundred dollars (\$100.00) per day..... | \$4300.00 |
| (TR 61) Hotel and other bills were marked for identification Nos. 1 to 7... | ? |
| (TR 158-163) Identification No. 8 marked showing expenses amounting to \$1688.88 less \$92.00 (TR 163) or..... | 1596.88 |
| And at TR 164-165 Identifications Nos. 1, 2, 4, 5, 6, 7 and 8 were admitted without objection | ? |
| At TR 276-278 Waxberg was cross-examined regarding the bills | |
| TR 268 places the cash benefit of the FHA Commitment to Appellants at.... | 4800.00 |
| | <hr/> |
| | \$10,696.88 |

Since the total amount of hotel bills admitted in evidence is not shown in figures in the transcript and since the Appellants' witness, Glenn Roy Sumter, stated at TR 268 the FHA Commitment had a value in addition to the \$4,800.00 liquidated value it is safe to assume these facts would easily allow the jury to find an additional sum of \$370.58 to arrive at their verdict of \$11,067.46 (TR 22).

7. This point hardly merits answer and is covered in paragraph 5 supra.

8. We urge that granting a continuance was discretionary with the lower Court; that the facts alleged in the third amended complaint conformed to the evidence; that such facts went in without objection by the

then Defendants' counsel; and that no element of surprise or prejudice to Appellants' case was caused by the Court's denial of a motion to continue the cause after the jury had been sitting on the case.

9. This point is answered in paragraph 6 supra.

10. After the verdict there were no developments warranting a new trial or judgment notwithstanding the verdict.

11. Instruction No. 3 complained of was not error. It contained a true statement of the case based on the testimony of both Plaintiff and Defendant below. The greater weight of the evidence was that the Respondent, Waxberg, did not intend to furnish services and pay expenses for Appellants gratuitously and therefore an implied contract to pay for the reasonable value could be assumed. The instruction left it to the jury to decide from the facts which of the parties, if either, was at fault.

LAW AND ARGUMENT.

I. EVIDENCE WAS SUFFICIENT TO ESTABLISH A CASE FOR THE JURY.

Appellee has proceeded in this cause on the theory of unjust enrichment and that there arose between the parties a quasi contract or implied agreement that Respondent Waxberg would receive value for his services and expenses that benefited the Appellant Hill.

The lower Court at TR 285 summed up a reasonable theory of the case when the judge stated in part:

“He (Waxberg) didn’t expect or have any agreement for dollars and cents payment by the Hills to him, but he expected something in return for his services * * *”

At TR 45 we find testimony of Appellee:

“Q. (By Mr. Hepp.) As a result of these discussions you had with Mr. Hill or that he had with you was, was there any agreement formed between the two of you?

A. A verbal agreement, yes.

Q. When did that occur, sir?

A. Well, I would say that it more or less grewed as we progressed with the deal. I was led to believe that I was going to do the building of this. All we had was a mutual understanding and he kept calling me from time to time. He would be in Seattle, he would call me to do this and ask me to do that and I naturally thought that and he led me to believe that we were going to put up the building together.”

Troyer v. Fox at 298 Pac. 733 states:

(4) Both express and implied contracts grow out of intentions of parties to transaction, and in each case there must be a meeting of the minds.

And at (4) page 739:

“A true implied contract is an agreement of the parties arrived at from their acts and conduct viewed in the light of surrounding circumstances, and not from their words either spoken or written. Like an express contract, it grows out of the intention of the parties to the transaction, and there must be a meeting of the minds. Such a contract differs from an express contract only in the mode of proof.”

TR 46-50 sets out services performed and expenses incurred by Mr. Waxberg for Mr. Hill including the FHA Commitment.

Then Waxberg testified at TR 51:

“Q. Did you build this building for Mr. Hill?

A. No.

Q. Why not?

A. Well, to put it in plain words, I was kicked out.

Q. By whom?

A. I would say by Mr. Hill.”

In *Thurston v. Nutter*, 47 A.L.R. 1156 (134 Atl. 506) at page 1161 in text we find:

“But if the agreement, instead of being contended by the Plaintiff or by the Defendant, was not completed because there was not a clear accession on both sides to one and the same set of terms (*Wiswell v. Bresnahan*, 84 Me. 398, 24 Atl. 885), or a complete mutuality of engagement so that each one had the right at once to hold the other to a positive agreement (*Preble v. Hunt*, 85 Me. 267, 27 Atl. 151), then the Plaintiff could maintain an action on a quantum meruit because, where one party renders services beneficial to another *under circumstances that negative* the idea that the services were gratuitous, and the party to whom the services are rendered knows it and permits it and accepts the benefit, he is bound to pay a reasonable compensation therefor. That is because such facts and *circumstances justify a presumption* that the party to whom the services are rendered must have requested them, and therefore the law implies a promise on his part to pay for them. *Wadleigh v. Katahdin Pulp & Paper Co.* 116 Me.

113, 100 Atl. 150. We think the circumstances here satisfy the rule, if the minds of the parties did not meet. The amount of benefit to the Defendant would be a question of fact for the determination of the jury." (Emphasis ours.)

In the case at bar the testimony is replete with benefits to Mr. Hill as the result of Mr. Waxberg's services (TR 46-50; 220-221; 266-268), etc. Nowhere is there testimony at the trial that the services and expenses were furnished gratuitously. Conversely, the agreement in effect was that Waxberg was to help secure an FHA Commitment and if a commitment was granted then Waxberg was to construct a building for Hill.

At TR 123 we note Waxberg on cross-examination:

"A. Well, you must remember that this is not bidding on a job. This is strictly promoting enough plans and specifications in order to obtain an FHA mortgage and this is not bidding on it. It is just helping Mr. Hill get this FHA mortgage is what that, that is all that is.

Q. So actually up to that time you had no firm agreement with Mr. Hill to build any kind of a building, did you?

A. Well, I certainly did. I wouldn't go down to Seattle. I wouldn't have been working on this thing all the time. My name wouldn't be on the commitment or application if there hadn't been some agreement and we had to hurry things in order to get under the deadline and if it hadn't been for that application and commitment issued under the deadline there would be no Polaris Building today because there wouldn't have been

an application in for a commitment issued which had been revised after the commitment was issued, I was through.”

Brown v. Crown Gold Milling Co., 89 Pac. 86:

“(2) In an action to recover the reasonable value of services performed, that a contract claimed to have been entered into between the parties was so indefinite that it could not be made the basis of recovery is immaterial, where evidence as to the contract was introduced to show the terms and nature of Plaintiff’s employment, and together with proof of its breach, was to be used as a basis of recovery for reasonable value.

(3) Where an employee is discharged without cause during the term of his employment, he may regard the contract as rescinded, sue on a quantum meruit, and recover the reasonable value of his services as if the special contract of employment had never been made, whether the contract was valid or invalid.”

It does not seem just or reasonable that the Appellant should be allowed to “unjustly enrich” himself where the testimony is replete with statements that Appellee Waxberg did not intend to work for nothing and where he was requested to do things by and for Mr. Hill as witness some of Waxberg’s testimony:

At TR 47:

“A. Well, about the first thing, Mr. Hill was in Seattle as I recall, he phoned me and wanted me to get a drill down on the ground as, to, for the foundation, what would be required for the foundation of the building.”

And at TR 48:

“Q. Well, under the similar circumstances I had Edgar Philleo make a, take a survey of the grounds and adjacent buildings and make a plot plan which was agreed by Mr. Hill. He asked me to get this work done.”

46 *American Jurisprudence*, page 99, in the second paragraph recites:

“It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, * * *”

In the case at bar Appellant Hill benefitted as the result of Waxberg's efforts both in securing data for building plans as well as the essential role in securing the FHA Commitment later used in a revised form (TR 124 and TR 266-268).

The Appellants' enrichment is a direct and immediate, not an indirect or collateral, consequence of the acts of Appellee Waxberg.

In re *Estate of Walton*, 238 N.W. 577:

“It is elementary that ordinarily where one person performs services for another which are known to and accepted by him, the law implies a promise to pay therefor.”

And on cross-examination at TR 146-147 Waxberg testified that the usual method was to recover

expenses only if the contractor built the building, and showing a difference in the instant case. In part the testimony was:

“Q. And that is what was anticipated in this case, you and Rudy are going in together, build this building, you were going to build the building and any expenditures the same as Rudy spent his time on the thing, to you by way of the profits in the building, to him by ownership in the building?”

A. Well, this is a little different situation. Had Rudy come with plans and specifications, this building as it is now, how much will you build this building for and I give him a figure then I am out, *but I helped promote this deal.* (Italics ours.)

Q. *I know you did.* (Italics ours.)

A. And it is altogether different than normal contracting operations.”

Certainly this is not the testimony of a man who intended his services to be gratuitous. It is true that had Waxberg built the building he would have recovered his expenses from the profits, if any. Why did he not build the structure?

(TR 54) testimony of Waxberg on direct:

“Q. You refused Mr. Hill’s proposal of giving him fifty thousand dollars out of the money that FHA designates to you as a builder?”

A. That’s right.

Q. Is that when you were dismissed, Mr. Waxberg?

A. Yes, that is when Mr. and Mrs. Hill left my room and I never saw them after that for

months. I tried to contact them but I couldn't get yes or no out of them.

Q. Have you, were you at that time and since, ready, willing and able to perform your agreement with the Hills in constructing that building?

A. I was any time that the plans would have been completed so that I could give a definite figure, I was ready to go and able to go.

Q. Do you know whether a building was ever constructed on these premises?

A. Yes.

Q. Do you know who constructed that building?

A. S. S. Mullen."

And on cross-examination of Waxberg at TR 145:

"Q. No, I say though after the commitment was issued and before you were kicked out, did you ever talk dollars to Rudy?

A. No, other than what, I remember one discussion about that if, I was to kick back fifty thousand dollars to him."

And continuing at TR 148:

"Q. Well, now, Al, when was this discussion when he demanded the fifty thousand dollar kick-back?

A. Oh, yes, that's right, too. That was in New Washington Hotel, I remember that, but what date. That must have been after the commitment was issued."

Appellee concedes that Waxberg was at the outset to be reimbursed for his preliminary services by constructing the building for Hill but the weight of the testimony was to the effect that Appellant Hill made

the construction impossible. We believe the following case, though concerning a will rather than a contract is in point:

Martin v. Wright's Adm'rs, 28 Am. Dec. 468:

“Where one performs services for another under a mutual understanding that the latter will make compensation therefor by a legacy in his will, such services are not gratuitous, and if the recipient of them does not give the expected legacy, an action lies against his representative for their value.”

Also called to attention is:

Pierson v. Pierson, 115 P. 2d 742

“(10) Where one party to a contract for services renders it impossible for the other party to carry out the contract, the latter may recover on a quantum meruit for services rendered up to the time of the breach.”

Or did the Appellants Hill merely use Waxberg and at some time in their dealings after they had safely secured the FHA Commitment, conceive the intent of securing another contractor more amendable to his or their terms?

Boardman v. Ward, 42 N.W. 202, 12 Am. St. Rep. 749:

“Where a person, under a mistake of fact, is induced by fraud or concealment of another to perform for him valuable services, the law implies an obligation to pay what the services are reasonably worth, and assumpsit lies to recover the same, although when rendered there was no expectation that they should be paid for.”

In addition to testimony already quoted as to Waxberg being "kicked out" of the deal, we find many more references to the breach caused by Mr. Hill at TR 53-54, 69 and at TR 145-148, concerning the "kickback" of fifty thousand dollars to Mr. Hill for Waxberg to construct the building.

Appellee cannot agree that the case of *Baker & Company v. Ballantine & Sons*, 20 Atl. 2d 82, et seq. cited in Appellants' brief is in point. Using Appellants' quotation is part from page 84:

"* * * and it appears in Baker's own testimony that he talked to Healey about certain advertising he was doing and the latter stated that the Defendant *would not pay* for that." (Italics ours.)

There is no statement of Mr. Hill in the record that he would not pay for Waxberg's services if Waxberg did not construct the building.

A case very similar to the one at bar and which is more eloquent than counsel is cited as follows:

City Ice & Fuel Co. v. Bright, 73 F. (2d) 461.

This was an action for compensation for data furnished Appellant and used by it. The first count of Plaintiff in lower Court alleged an express contract; the second was based on quantum meruit.

The Court directed a verdict for Defendant upon the count alleging an express contract, but submitted the case on quantum meruit to the jury.

In the syllabus we find:

"3. Law will imply a contract to pay for information from circumstances that party to whom

furnished recognized its merit, accepted it, and made full use thereof as basis for purchase of ice plants and businesses.” (Supported by 4 and 5.)

“6. One accepting another’s services need not have believed that latter expected pay therefor to become liable for compensation, but is bound to pay if he should have understood, as a reasonable man, from what he knew, that pay was expected.” (63 N.E. 947.)

II. DEFENDANTS’ REQUESTED INSTRUCTIONS.

As elsewhere stated herein under Specification of Errors, we believe the then Defendants’ instructions were properly refused in that to have given them would have in effect been a directed verdict unwarranted under the evidence.

Appellants chose to ignore all testimony as to Appellee expecting compensation in the form of a construction contract, and argued that Hill was entitled to the benefits without any compensation therefor. A more flagrant case of unjust enrichment can hardly be imagined and apparently the jury was of that opinion.

III. COURT’S INSTRUCTIONS.

The Court’s Instruction No. Three contains a clear and concise statement of the evidence in the case.

Certainly Appellants cannot prevail under any type of contract if their fault is the reason for an agreement not being completed.

Mr. Waxberg testified at TR 68:

"A. Well, it was a mutual agreement that I was to be the builder and he (Hill) was to be the owner of the building and I was to get for my risk and my share of the profit would be what the FHA allows which is six per cent on the total amount of the commitment. See in other words, the builder's fee, which is standard all over the country, is six per cent of the commitment.

Q. You mutually agreed with Mr. Hill, now there must have been more to it. What was all contained in that agreement, if anything more?

A. Well, that I was to help promote the building and help get the plans completed and, which I did everything I could. We got the commitment."

And at TR 313 on cross-examination by Mr. McNabb, Hill stated:

"Q. Mr. Hill, were you willing that Mr. Waxberg should build this building?

A. Yes. I should have preferred a local builder on the building.

Q. Why did he not build it?

A. Because I could not pay the price he asked to build it."

But see TR 54 by Waxberg on direct:

"Q. You refused Mr. Hill's proposal of giving him fifty thousand dollars out of the money that FHA designates to you as a builder?

A. That's right.

Q. Is that when you were dismissed, Mr. Waxberg?

A. Yes. * * *"

And again at TR 94 on cross-examination of Waxberg:

“Q. (By Mr. McNabb.) Now, I believe you testified on direct examination that not only you but Chiarelli and Kirk and Orsini were all fired?

A. That’s right.

Q. As quickly as the commitment was issued.

A. That’s right.”

The testimony merely shows an agreement of sorts between the parties. The understanding between them in the light of surrounding circumstances and events was such as to imply an obligation on the part of Hill to pay Waxberg for the reasonable value of benefits retained by Hill.

The implication is there by law and the jury was properly instructed as to quantum meruit where Instruction No. Three stated:

“* * * for the value of the benefit which the defendant received as a result of plaintiff’s services and expenditures.”

The fact that the lower Court did not use the words “implied contract” or “quantum meruit” in no wise lessens its presence, nor would the inclusion of such language have benefited Appellant.

If it were true that both parties were at fault, nonetheless, Hill should not be allowed to unjustly enrich himself at Waxberg’s expense.

Even if the instruction is questioned by the Appellate Court, the almost conclusive evidence favoring Appellee should be considered as in:

United States Potash Co. v. McNutt, 70 F. (2d)

126

“18. Party is not entitled to a second trial where correct verdict is inescapable conclusion from facts found by the jury in response to erroneous instruction.”

IV. EXCESSIVE VERDICT.

We believe that in the answer to Specification of Errors *supra* it is established the verdict is not excessive (TR 58, 61, 158-163, 164-165, 276-278, and 268).

The testimony of Mr. Waxberg (TR 40) showed he had been a builder and contractor for about thirty years. As such he was certainly qualified to testify as to the value of his time. This together with proven expenses and the testimony of Mr. Sumter for Mr. Hill, none of which was controverted by the defense, established the basis for the jury's findings.

CONCLUSION.

It is urged that the jury heard the testimony and viewed the evidence and the demeanor of the parties and their witnesses, and fairly arrived at their verdict.

It is difficult to fathom the mind of the Appellants and to find any justification for refusal to pay for the benefits had and retained by him as the direct result of Appellee's efforts and services.

Waxberg's testimony throughout indicated that he always expected to be compensated in some form for his efforts, and nowhere does Mr. Hill urge that the services were considered gratuitous.

The parties had a fair trial and the decision of the lower Court should be affirmed.

Dated, Fairbanks, Alaska,
July 16, 1956.

Respectfully submitted,
R. J. McNEALY,
EVERETT W. HEPP,
By R. J. McNEALY,
Attorneys for Appellee.